

1 RICHARD R. WAITE (SBN 97942)  
 2 MARY M. BEST (SBN 110220)

2 **KEENEY WAITE & STEVENS**

3 A Professional Corporation

3 125 North Acacia Avenue, Suite 101

4 Solana Beach, CA 92075

4 Telephone: (858) 523-2130

5 Facsimile: (858) 523-2135

5 Attorneys for Defendant

6 PACIFIC BAGELS, LLC D.B.A. BRUEGGLERS BAGELS

7

8 **UNITED STATES DISTRICT COURT**

9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 OUTERBRIDGE ACCESS ) Case No. 07 CV 2129 BTM (AJB)

11 ASSOCIATION, SUING ON BEHALF )

12 OF DIANE CROSS; and DIANE CROSS, )

13 An Individual, )

14 Plaintiffs, )

15 v. )

16 MARIE CALLENDER'S PIE SHOPS, )

17 INC. d.b.a. MARIE CALLENDER'S )

18 #254; PACIFIC BAGELS, LLC d.b.a. )

19 BRUEGGLERS BAGELS; COURTYARD )

20 HOLDINGS, LP; PSS PARTNERS, LLC; )

21 AND DOES 1 THROUGH 10, Inclusive, )

22 Defendants. )

23 COMES NOW, Defendant Pacific Bagels, LLC d.b.a Brueggers Bagels (hereafter

24 "Defendant") and answers Plaintiffs' Complaint as follows:

25 1. In answering paragraph 1, Defendant denies, generally and specifically, the  
 26 allegations.

27 2. In answering paragraph 2, Defendant admits that Plaintiffs are invoking Federal  
 28 statutes for jurisdiction. As to the other allegations in this paragraph, Defendant denies, generally  
 and specifically, the allegations.

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1       3. In answering paragraph 3, Defendant admits that Plaintiffs are asking the Court to  
2 exercise supplemental jurisdiction over State claims alleged in the Complaint. As to the other  
3 allegations in this paragraph, Defendant denies, generally and specifically, the allegations.

4       4. In answering paragraph 4, Defendant admits that Defendant is a business doing  
5 business under the laws of the State of California and doing business as Brueggers Bagels at 11134  
6 Rancho Carmel Drive, San Diego, California 92128. Defendant is not the owner of the property;  
7 Defendant is a tenant at the property. As to the other allegations in this paragraph, Defendant lacks  
8 sufficient information or belief to answer the allegations contained therein, and on that basis, denies,  
9 generally and specifically, the allegations.

10      5. In answering paragraph 5, no factual assertions are made and no response is called  
11 for.

12      6. In answering paragraph 6, Defendant denies the allegations and notes that Doe  
13 pleading is disfavored in Federal Court.

14      7. In answering paragraph 7, Defendant denies, generally and specifically, the  
15 allegations.

16      8. In answering paragraph 8, Defendant denies, generally and specifically, the  
17 allegations.

18      9. In answering paragraph 9, Defendant denies, generally and specifically, the  
19 allegations.

20      10. In answering paragraph 10, Defendant denies, generally and specifically, the  
21 allegations.

22      11. In answering paragraph 11, Defendant denies, generally and specifically, the  
23 allegations.

24      12. In answering paragraph 12, Defendant lacks sufficient information and belief to  
25 answer the allegations contained therein and on that basis denies, generally and specifically, the  
26 allegations.

27      ///

28      ///

1       13. In answering paragraph 13, Defendant lacks sufficient information and belief to  
2 answer the allegations contained therein and on that basis denies, generally and specifically, the  
3 allegations.

4       14. In answering paragraph 14, Defendant lacks sufficient information and belief to  
5 answer the allegations contained therein and on that basis denies, generally and specifically, the  
6 allegations.

7       15. In answering paragraph 15, Defendant lacks sufficient information and belief to  
8 answer the allegations contained therein and on that basis denies, generally and specifically, the  
9 allegations.

10       16. In answering paragraph 16, Defendant lacks sufficient information and belief to  
11 answer the allegations contained therein and on that basis denies, generally and specifically, the  
12 allegations.

13       17. In answering paragraph 17, Defendant lacks sufficient information and belief to  
14 answer the allegations contained therein and on that basis denies, generally and specifically, the  
15 allegations.

16       18. In answering paragraph 18, Defendant lacks sufficient information and belief to  
17 answer the allegations contained therein and on that basis denies, generally and specifically, the  
18 allegations.

19       19. In answering paragraph 19, Defendant lacks sufficient information and belief to  
20 answer the allegations contained therein and on that basis denies, generally and specifically, the  
21 allegations.

22       20. In answering paragraph 20, Defendant lacks sufficient information and belief to  
23 answer the allegations contained therein and on that basis denies, generally and specifically, the  
24 allegations.

25       21. In answering paragraph 21, Defendant lacks sufficient information and belief to  
26 answer the allegations contained therein and on that basis denies, generally and specifically, the  
27 allegations.

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1       22. In answering paragraph 22, Defendant lacks sufficient information and belief to  
2 answer the allegations contained therein and on that basis denies, generally and specifically, the  
3 allegations.

4       23. In answering paragraph 23, Defendant lacks sufficient information and belief to  
5 answer the allegations contained therein and on that basis denies, generally and specifically, the  
6 allegations.

7       24. In answering paragraph 24, Defendant lacks sufficient information and belief to  
8 answer the allegations contained therein and on that basis denies, generally and specifically, the  
9 allegations.

10      25. In answering paragraph 25, Defendant lacks sufficient information and belief to  
11 answer the allegations contained therein and on that basis denies, generally and specifically, the  
12 allegations.

13      26. In answering paragraph 26, Defendant lacks sufficient information and belief to  
14 answer the allegations contained therein and on that basis denies, generally and specifically, the  
15 allegations.

16      27. In answering paragraph 27, no factual assertions are made and no response is called  
17 for.

18      28. In answering paragraph 28, no factual assertions are made and no response is called  
19 for.

20      29. In answering paragraph 29, Defendant denies, generally and specifically, the  
21 allegations.

22      30. In answering paragraph 30, Defendant denies, generally and specifically, the  
23 allegations.

24      31. In answering paragraph 31, Defendant lacks sufficient information and belief to  
25 answer the allegations contained therein and on that basis denies, generally and specifically, the  
26 allegations.

27      ///

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1       32. In answering paragraph 32, Defendant lacks sufficient information and belief to  
2 answer the allegations contained therein and on that basis denies, generally and specifically, the  
3 allegations.

4       33. In answering paragraph 33, Defendant lacks sufficient information and belief to  
5 answer the allegations contained therein and on that basis denies, generally and specifically, the  
6 allegations.

7       34. In answering paragraph 34, Defendant lacks sufficient information and belief to  
8 answer the allegations contained therein and on that basis denies, generally and specifically, the  
9 allegations.

10      35. In answering paragraph 35, Defendant lacks sufficient information and belief to  
11 answer the allegations contained therein and on that basis denies, generally and specifically, the  
12 allegations.

13      36. In answering paragraph 36, Defendant lacks sufficient information and belief to  
14 answer the allegations contained therein and on that basis denies, generally and specifically, the  
15 allegations.

16      37. In answering paragraph 37, Defendant lacks sufficient information and belief to  
17 answer the allegations contained therein and on that basis denies, generally and specifically, the  
18 allegations.

19      38. In answering paragraph 38, Defendant lacks sufficient information and belief to  
20 answer the allegations contained therein and on that basis denies, generally and specifically, the  
21 allegations.

22      39. In answering paragraph 39, no factual assertions are made and no response is called  
23 for.

24      40. In answering paragraph 40, Defendant lacks sufficient information and belief to  
25 answer the allegations contained therein and on that basis denies, generally and specifically, the  
26 allegations.

27      ///

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41. In answering paragraph 41, Defendant lacks sufficient information and belief to answer the allegations contained therein and on that basis denies, generally and specifically, the allegations.

42. In answering paragraph 42, Defendant lacks sufficient information and belief to answer the allegations contained therein and on that basis denies, generally and specifically, the allegations.

43. In answering paragraph 43, Defendant lacks sufficient information and belief to answer the allegations contained therein and on that basis denies, generally and specifically, the allegations.

44. In answering paragraph 44, Defendant lacks sufficient information and belief to answer the allegations contained therein and on that basis denies, generally and specifically, the allegations.

45. In answering paragraph 45, no factual assertions are made and no response is called for.

46. In answering paragraph 46, Defendant lacks sufficient information and belief to answer the allegations contained therein and on that basis denies, generally and specifically, the allegations.

47. In answering paragraph 47, Defendant denies, generally and specifically, the allegations.

48. In answering paragraph 48, Defendant lacks sufficient information and belief to answer the allegations contained therein and on that basis denies, generally and specifically, the allegations.

49. In answering paragraph 49, Defendant denies, generally and specifically, the allegations.

## **AFFIRMATIVE DEFENSES**

The following separate affirmative defenses are alleged to the Complaint and to each and every cause of action thereof:

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1                   **FIRST AFFIRMATIVE DEFENSE**

2       The Complaint fails to state facts sufficient to constitute a cause of action against Defendant.

3                   **SECOND AFFIRMATIVE DEFENSE**

4       Plaintiffs are estopped from asserting the claims herein and have waived all rights in  
5 connection therewith.

6                   **THIRD AFFIRMATIVE DEFENSE**

7       The Complaint fails to state a claim upon which relief can be granted.

8                   **FOURTH AFFIRMATIVE DEFENSE**

9       Plaintiffs are barred from seeking any equitable relief by reason of Plaintiffs' own unclean  
10 hands.

11                  **FIFTH AFFIRMATIVE DEFENSE**

12      At all relevant times, Defendant acted in good faith.

13                  **SIXTH AFFIRMATIVE DEFENSE**

14      Plaintiffs' claims are barred as being untimely pursuant to the applicable statute of  
15 limitations.

16                  **SEVENTH AFFIRMATIVE DEFENSE**

17      Plaintiffs' claims are barred by the doctrine of laches.

18                  **EIGHTH AFFIRMATIVE DEFENSE**

19      Defendant had no notice that any of its actions were in violation of any statutes, laws or  
20 regulations.

21                  **NINTH AFFIRMATIVE DEFENSE**

22      Any violation was the result of action by others not Defendant.

23                  **TENTH AFFIRMATIVE DEFENSE**

24      Defendant had and has no legal ability to correct the violations alleged by Plaintiffs.

25                  **ELEVENTH AFFIRMATIVE DEFENSE**

26      Plaintiffs were negligent in and about the matters alleged in the Complaint and their own  
27 negligence proximately caused and contributed to the damages and injuries alleged by Plaintiffs, if  
28 any such damage or injury occurred at all, and Plaintiffs' recovery, if any, should thereby be barred

1 or reduced to the extent that any such damage or injury was caused or contributed to by their own  
2 negligence.

3                   **TWELFTH AFFIRMATIVE DEFENSE**

4 Plaintiffs' claims for relief, and each of them, are barred by Plaintiffs' failure to mitigate the  
5 damages, if any, that Defendant is alleged to have caused.

6                   **THIRTEENTH AFFIRMATIVE DEFENSE**

7 The Complaint, and each claim purportedly stated therein, fails to state a claim upon which  
8 relief can be granted to Plaintiffs because the performance called for by Defendant under the alleged  
9 statutes was commercially impracticable.

10                  **FOURTEENTH AFFIRMATIVE DEFENSE**

11 The Complaint, and each and every purported cause of action contained therein, fails to state  
12 a cause of action upon which relief can be granted. Plaintiffs have failed to allege a real and  
13 immediate threat that the harm will be repeated and have further failed to allege and cannot establish  
14 that this Court may grant relief which may redress such purported harm so as to have standing under  
15 the Constitution of the United States that the alleged harm was other than a single, isolated past  
16 incident.

17                  **FIFTEENTH AFFIRMATIVE DEFENSE**

18 The Court lacks subject matter jurisdiction over this action.

19                  **SIXTEENTH AFFIRMATIVE DEFENSE**

20 Any affirmative relief granted against this Defendant should be mitigated by the fact that  
21 Plaintiffs intentionally placed themselves onto the facility, if at all, for the sole purpose of claiming  
22 injury and further failed to demonstrate any actual harm.

23                  **SEVENTEENTH AFFIRMATIVE DEFENSE**

24 Plaintiffs have failed to join indispensable parties known by Plaintiffs and without whose  
25 joinder complete relief cannot be afforded in this action.

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**EIGHTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in full or in part because the responsibility for any alleged compliance with all relevant state and federal statutes, regulations, rules, orders, directives and guidelines has been contractually allocated to other persons and/or entities.

**NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in full or in part because Defendant complied with all relevant state and federal statutes, regulations, rules, orders, directives and guidelines at all relevant times.

**TWENTIETH AFFIRMATIVE DEFENSE**

Each of Plaintiffs' causes of action in the Complaint are barred under the doctrine of substantial compliance.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

The alleged violations of statutes are not readily achievable.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

The alleged violations of statutes are structurally impracticable and therefore, Defendant is unable to comply with the applicable requirements of law as set forth in the Complaint.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Defendant has not caused the property to undergo any alterations, structural repairs and additions which would subject it to the provisions and requirements of law as set forth in the Complaint.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs failed to perform all duties and obligations by failing to adequately specify their requirements to this answering Defendant, failed to timely notify Defendant of any alleged conditions as set forth in the Complaint herein, and failed to give Defendant timely opportunity to cure said alleged conditions, or to mitigate any damage, if any, resulting from said conditions. Such acts or omissions bar Plaintiffs' recovery herein.

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**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Defendant acted with due care and otherwise conducted itself reasonably under the circumstances and at all relevant times. Therefore, Defendant is not liable for any claims alleged in this Complaint.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

There is no causal connection between any conduct of Defendant and any alleged harm which Plaintiffs contend they have sustained.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

Conditions have so changed since the filing of the Complaint, no unlawful act is threatened and no remaining justiciable controversy exists for adjudication by the Court.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred because Plaintiffs lack standing and/or capacity to bring this action.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

If Plaintiffs are entitled to any damages under the circumstances alleged in the Complaint or in any other respect, which is denied, these injuries and damages were wholly or in part, directly, proximately caused and contributed to by the negligence, carelessness, lack of due care and fault of third parties. In the event Plaintiffs are found to have any damages and to be entitled to any damages, Defendant is liable only for that portion of any damages which correspond to its degree of fault or responsibility and is not liable for any damage contributable to the responsibility, negligence or fault of any other party.

**THIRTIETH AFFIRMATIVE DEFENSE**

Plaintiffs' recovery in this action is barred because Defendant's alleged acts and/or omissions do not constitute a denial to physically disabled persons of full and equal access to the business establishment.

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1                   **THIRTY-FIRST AFFIRMATIVE DEFENSE**

2       Plaintiffs' recovery in this action is barred because Defendant's acts, as alleged in the  
3 Complaint, to the extent that it committed any acts at all, were done in good faith pursuant to  
4 reasonable business justifications.

5                   **THIRTY-SECOND AFFIRMATIVE DEFENSE**

6       The Complaint or portions thereof, is based on statutes that, in the context of this lawsuit are  
7 void, invalid, and otherwise unenforceable as violating the due process clauses of the United States  
8 and California constitutions.

9                   **THIRTY-THIRD AFFIRMATIVE DEFENSE**

10      Plaintiffs' recovery in this action is barred because Defendant's conduct was, at all times  
11 mentioned in the Complaint, justified and privileged.

12                  **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

13      Defendant is not liable because Plaintiffs failed to request any accommodations be made by  
14 Defendant.

15                  **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

16      All applicable legal requirements pertaining to access to the premises by disabled persons  
17 have been complied with through all necessary permits obtained from appropriate authorities for  
18 construction, alteration or structural modification of the premises and Defendant reasonably relied  
19 on those authorities.

20      WHEREFORE, Defendant prays as follows:

- 21       1.     That Plaintiffs take nothing;
- 22       2.     Dismissal of Plaintiffs' Complaint with prejudice;
- 23       3.     Defendant be granted costs and expenses incurred in defending this action including  
24 reasonable attorneys' fees and expert fees; and
- 25       4.     Granting Defendant such other relief as the Court may deem just and proper.

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1 Dated: November 27, 2007

KEENEY WAITE & STEVENS  
A Professional Corporation

2 By:

3   
4 Richard R. Waite  
5 Mary M. Best  
6 Attorneys for Defendant  
7 PACIFIC BAGELS, LLC D.B.A.  
8 BRUEGGER'S BAGELS

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Otterbridge Access Association, et al. v. Marie Callender's Pie Shops, Inc., et al.

United States District Court, Southern District of California Case No. 07 CV 2129 BTM (AJB)

**PROOF OF SERVICE**

[CCP 1013A (3) and 2015.5]

I am employed in the City and County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 125 North Acacia Avenue, Suite 101, Solana Beach, California, 92075.

On November 27, 2007, I caused to be served the attached:

1. ANSWER OF PACIFIC BAGELS, LLC D.B.A. BRUEGGLERS BAGELS.

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Theodore A. Pinnock, Esq.  
David C. Wakefield, Esq.  
Michelle L. Wakefield, Esq.  
**PINNOCK & WAKEFIELD, A.P.C.**  
3033 Fifth Avenue, Suite 410  
San Diego, CA 92103  
(619) 858-3671 Telephone  
(619) 858-3646 Facsimile  
Attorneys for Plaintiff

I declare under penalty of perjury under the laws of the State of California, that the above is true and correct.

Executed on November 27, 2007, at San Diego, California.

SLST  
Sharon Strong

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**KEENEY WAITE & STEVENS**  
 A PROFESSIONAL LAW CORPORATION  
 THE KARMA BUILDING  
 125 NORTH ACACIA AVENUE, SUITE 101  
 SOLANA BEACH, CA 92075  
 TELEPHONE: (858) 523-2130 FAXSIMILE: (858) 523-2135  
[www.keenlaw.com](http://www.keenlaw.com)

SAN DIEGO OFFICE  
 550 WEST C STREET, SUITE 1550  
 SAN DIEGO, CA 92101-3540  
 TELEPHONE (619) 234-1651  
 FACSIMILE (619) 234-1657

### FACSIMILE TRANSMITTAL SHEET

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TO:	FROM:
Theodore A. Pinnock, Esq.	Richard R. Waite (rwaite@keenlaw.com)
David C. Wakefield, Esq.	
Michelle L. Wakefield, Esq.	
COMPANY:	SENDER'S DIRECT DIAL:
PINNOCK & WAKEFIELD, A.P.C.	(858) 523-2133
FAX NUMBER:	SENDER'S FAX NO.:
(619) 858-3646	(858) 523-2135
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(619) 858-3671	November 27, 2007
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